

EMPLOYMENT

The qualified legalisation of cannabis does not extend to the workplace

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ISSUE

Whether the recent Constitutional Court case of *Minister of Justice and Correctional Services v Prince and Others*, in which the private use of cannabis was declared legal, has any bearing on an employer's ability to discipline employees for being under the influence of cannabis whilst on duty.

SUMMARY

The Commission for Conciliation, Mediation and Arbitration ("**CCMA**") found, *inter alia*, the fact that it was lawful to smoke cannabis in one's private residence has no bearing on whether an employer can discipline employees for being under the influence of cannabis in the workplace.

CCMA'S DECISION

In the case of *Mthembu and Others v NCT Durban Wood Chips* ("**Mthembu**")^[1] the CCMA had to determine, among others, whether the substantive fairness of the dismissal of four employees ("the **Employees**") who had been found to have been under the influence of cannabis during working hours was fair.

The Employees were employed by NCT Durban Wood Chips (the "**Employer**"). The Employer conducts business in the wood and chip industry. The Employer's operations were of a 'highly dangerous nature'; they involved large machinery and dangerous vehicles coming in and out of the premises throughout the day. The Employees all occupied positions that exposed them to forms of danger. As a result, the Employer adopted a strict zero tolerance substance abuse policy ("**Policy**") prohibiting any employee from working whilst under the influence of alcohol and/or drugs.

The Employer conducted a drug test during April 2017 on all its employees. The Employees tested positive for cannabis and were charged with being "[u]nder the influence of intoxicating substances whilst on duty". A disciplinary hearing was held and they were subsequently found guilty and dismissed. The Employees challenged the fairness of their dismissal at the CCMA on the basis that they had not smoked the drug during working hours but during their spare time.

It was common cause that all the Employees signed the Policy and that it provided that no one under the influence of drugs would be allowed on the premises of the business. The policy further states that the respondent has a zero tolerance approach to substance abuse.

At their disciplinary hearing, the Employees admitted that they were under the influence of cannabis on the day they were tested. The Employees also provided the same explanation: that they had smoked cannabis in their private time.

In determining whether this constituted a legitimate defence, the commissioner considered the Constitutional Court case of *Minister of Justice and Correctional Services v Prince and Others* ("**Prince**").^[2] The *Prince* case had found that legislation criminalising the private use of Cannabis is inconsistent with the Constitution of the Republic of South Africa.

The commissioner did not find this to be a convincing defence. It was common cause that the Employees were aware of the Policy and that the Policy adopted a zero tolerance approach to substance abuse, and that the rule was reasonable taking into account the health and safety considerations within the workplace. The commissioner also found that, like alcohol, where there is even a slight chance that such "intoxication could impair one's ability to work to the standard, care and skill required of the employee, the employer is entitled to discipline where the intoxication leads to an offence.

The CCMA found that although the *Prince* decision legalised the use of cannabis for personal use in one's private space, the nature of the Employer's business required their Employees to have a clear mind when operating machinery. The Commissioner equated being under the influence of cannabis after having smoked it during one's spare time with consuming alcohol to such an extent the night before that the employee reports for duty under the influence the next day. It is the danger presented by being intoxicated at the workplace that is the central consideration. This places the employee, other employees and the business itself at risk. The Employees had an obligation to ensure that once they reported for duty they were no longer under the influence of intoxicating substances. Applying an objective test to whether there was a wilful disregard of safety rules the commissioner found that the employees had showed a wilful disregard for the safety rules of the Employer. In doing so, they were guilty of having committed misconduct. In the circumstances, it would be reasonable to expect the Employees not to present themselves to work under the influence of cannabis because of the dangers present at the workplace. The Employer's decision to dismiss the Employees was, therefore, substantively fair.

IMPORTANCE OF THE CASE

Like alcohol, the consumption of cannabis in private time and at a private space may be legal but arriving at work still under the influence of the drug may lead to serious disciplinary consequences.

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[1] [2019] 4 BALR 396 (CCMA).

[2] 2018 (6) SA 393 (CC).



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